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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CHARLES D. RIEL,

Petitioner,

v.

ROBERT L. AYERS, JR.,  
Warden of California State  
Prison at San Quentin,

Respondent.

NO. CIV. S-01-0507 LKK/KJM

DEATH PENALTY CASE

O R D E R

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Petitioner is before the court on a petition for habeas corpus, 28 U.S.C. § 2254. On February 22, 2005, petitioner moved for an evidentiary hearing on some of his claims. On April 14, 2008, the magistrate judge granted the motion in part and denied it in part. On May 22, 2008, the petitioner filed "objections" to the order and on June 6, 2008, the respondent filed an opposition to those objections.

Preliminarily, petitioner objects to the magistrate judge having issued an order resolving the motion, contending that the

1 magistrate judge only had the authority to issue findings and  
2 recommendations that would then be reviewed *de novo* by this court.  
3 This appears to be correct. Per statute, a magistrate judge may not  
4 rule on dispositive motions. See 28 U.S.C. § 636(b). The decision  
5 to grant an evidentiary hearing is not a dispositive motion, as it  
6 does not necessarily result in the grant or denial of relief on any  
7 of petitioner's claims. However, perhaps out of consideration for  
8 the fact that the denial of an evidentiary hearing on a claim  
9 typically results in the dismissal of the claim, the Supreme  
10 Court's Rules Governing Section 2254 and 2255 Petitions provide  
11 that it is the district court that determines whether to grant a  
12 request for an evidentiary hearing. See Rule 8(b) Governing Section  
13 2254 and 2255 Petitions & Advisory Committee Note (observing that  
14 most petitions are dismissed if no evidentiary hearings are held).<sup>1</sup>  
15 If the district court determines the hearing is merited, it may  
16 refer the petition to the magistrate judge to conduct it. Id. The  
17 district court's decision whether to grant an evidentiary hearing  
18 may be informed by the recommendation of the magistrate judge. See  
19 id. The Advisory Notes reinforce this interpretation of the Rules,  
20 explaining that Rule 8(b)

21 provides that a magistrate, when so empowered by rule of  
22 the district court, may recommend to the district judge  
23 that an evidentiary hearing be held or that the petition  
24 be dismissed, provided he gives the district judge a  
sufficiently detailed description of the facts so that  
the judge may decide whether or not to hold an

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25 <sup>1</sup>The Local Rules expressly acknowledge that the Rules  
26 Governing Section 2254 and 2255 Petitions apply to capital habeas  
corpus petitions filed in this court. Local Rule 81-191(a).

1       evidentiary hearing.

2       Consequently, the court construes the magistrate judge's April 14,  
3       2008 as findings and recommendations on the motion for an  
4       evidentiary hearing, which the court reviews *de novo*. 28 U.S.C. §  
5       636(b) (1) (C) .

6       The court has conducted a *de novo* review of the magistrate  
7       judge's recommendations, petitioner's objections thereto and  
8       respondent's response. For the most part, the court finds the  
9       magistrate judge's findings of fact and conclusions of law entirely  
10      supported by the record and by proper analysis.

11      One exception is that raised by petitioner regarding the  
12      evidence necessary to convict a non-killer of felony murder based  
13      on that person's involvement in the non-homicide felony. As the  
14      magistrate judge noted, the petitioner's theory, for which he  
15      presented evidence at the trial, was that petitioner slept through  
16      the robbery, kidnaping, and homicide of the victim, although he was  
17      involved with moving the body and may have been involved in a  
18      different robbery that night. He testified at trial that another  
19      man, John Osborne, had killed the victim. The degree of  
20      petitioner's participation in the robbery, kidnaping, and homicide  
21      was therefore central to petitioner's defense at the guilt phase  
22      and for the special circumstances determination.<sup>2</sup>

23      Briefly, petitioner argues that his counsel was ineffective

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25      <sup>2</sup>The special circumstances charged were that the murder was  
26      perpetrated during a robbery and that the murder was perpetrated  
    during a kidnaping. The jury found both special circumstances to  
    be true.

1 for failing to investigate and present evidence that would tend to  
2 show that it was unlikely that he was the leader in the crimes,  
3 despite his codefendants' testimony to the contrary. Petitioner  
4 also argues that his counsel was ineffective for failing to object  
5 to physical evidence (fingerprints on a beer can and a blood smear  
6 on petitioner's clothes) and that the prosecutor unlawfully  
7 presented testimony by a sheriff's deputy about the beer can, which  
8 the prosecutor should have known was false. These comprise  
9 petitioner's claims 2, 5, 6, and 9. Petitioner objects to the  
10 magistrate judge's conclusion that an evidentiary hearing would not  
11 assist in the resolution of these claims as they relate to the  
12 guilt phase.

13 In assessing the prejudice for these claims, the magistrate  
14 judge relied on the felony-murder rule for triggermen, citing  
15 People v. Reynolds, 186 Cal. App. 3d 988, 994 (1986). Under that  
16 rule, the triggerman may be guilty of felony murder even if he only  
17 has the specific intent to commit the non-homicide felony. A  
18 different rule applies, however, to a defendant who is not the  
19 triggerman and is prosecuted for felony-murder. In that situation,  
20 the California Supreme Court has held, "the felony-murder rule does  
21 not apply to nonkillers where the act resulting in death is  
22 completely unrelated to the underlying felony other than occurring  
23 at the same time and place." People v. Cavitt, 33 Cal. 4th 187, 196  
24 (2004). Instead, "there must be a logical nexus . . . between the  
25 felony and the act resulting in death before the felony-murder rule  
26 may be applied to the nonkiller." Id. The nonkiller can be found

1 guilty under the felony-murder rule "even if the nonkiller is not  
2 physically present at the time of the homicide, so long as the  
3 felony that the nonkiller committed or attempted to commit and the  
4 homicidal act are part of one continuous transaction." Id.

5 The magistrate judge did not address this nexus. She held that  
6 even if the allegedly ineffective assistance of counsel or  
7 prosecutorial misconduct had not occurred, the evidence still  
8 tended to show petitioner's "participat[ion] in the events leading  
9 up to, at the very least, a robbery" and that he was "sufficiently  
10 involved in the planning." Order, April 14, 2008 at 18; see also  
11 id. at 23, 24.

12 Petitioner argues that this analysis is insufficient under the  
13 Cavitt rule, particularly because there was evidence tendered at  
14 trial that petitioner may have been involved with his codefendants  
15 in an unrelated robbery attempt that may have occurred prior to the  
16 robbery, kidnaping and homicide of the victim. See Reporter's  
17 Transcript 3311-17, 5481-82. Under this theory, although petitioner  
18 may have been involved in an attempted robbery the night of the  
19 homicide, that attempt was not part of the "continuous transaction"  
20 that included the homicide nor would it establish that petitioner  
21 "committed or attempted to commit" the robbery and kidnaping that  
22 may have been a part of the continuous transaction that included  
23 the homicide. See Cavitt, 33 Cal. 4th at 196.

24 In this light, the Strickland<sup>3</sup> and Giglio<sup>4</sup> prejudice standards

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25 <sup>3</sup>Under Strickland v. Washington, 466 U.S. 668, 694 (1984),  
26 ineffective assistance of counsel is grounds for relief where there

1 are not foreclosed for claims 2, 5, 6 and 9 as to the guilt phase.  
2 All of the evidence at issue in the claims -- evidence of the  
3 likelihood that petitioner was the ringleader of the robbery,  
4 kidnaping, and murder of the victim, evidence of the petitioner's  
5 fingerprint on the beer can present at the site of the robbery of  
6 the victim, and evidence of the blood splatter on the petitioner's  
7 clothes -- tended to link petitioner to the robbery or homicide of  
8 the victim. Had this evidence been more strenuously challenged by  
9 the defense or the testimony regarding the beer can not tendered  
10 by the prosecutor, the jury may reasonably have found that  
11 petitioner did not commit or attempt to commit the robbery of the  
12 truck stop nor was the triggerman in the homicide. The magistrate  
13 judge therefore erred in concluding that the evidence nevertheless  
14 showed that petitioner was somehow involved in some part of the  
15 course of events that transpired that night. Under Cavitt, the jury  
16 needed to have credited the prosecutor's theory that petitioner was  
17 the killer and had at least the mens rea to commit the underlying  
18 felony, or that he was not the killer but that he committed or  
19 attempted to commit a felony that was part of the continuous  
20 transaction that included the homicide. See Cavitt, 33 Cal. 4th at  
21 196. Petitioner has tendered sufficient evidence to show that an

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22 is a "reasonable probability that but for counsel's unprofessional  
23 errors, the result of the proceedings would have been different."

24 <sup>4</sup>Under Giglio v. United States, 405 U.S. 150 (1972), the  
25 prosecution's creation of a false impression about the evidence  
26 against the defendant requires a new trial where there is a  
reasonable likelihood that the false impression could have affected  
the verdict.

1 evidentiary hearing is warranted on this aspect of his claims 2,  
2 5, 6 and 9.

3 **CONCLUSION**


4 Accordingly, petitioner's February 22, 2005 motion for an  
5 evidentiary hearing is GRANTED IN PART AND DENIED IN PART. The  
6 matter is referred to the magistrate court to conduct an  
7 evidentiary hearing on the issues raised in claims 2, 5, 6, and 9,  
8 as they affected the guilt phase, penalty phase, and special  
9 circumstances determinations.

10 A ruling on petitioner's request for an evidentiary hearing  
11 on claim 39 is deferred pending resolution of the Northern District  
12 of California case Morales v. Tilton, Nos. C06219-JF-RS, C06926-JF-  
13 RS.

14 Petitioner's motion is denied in all other respects.

15 IT IS SO ORDERED.

16 DATED: March 27, 2009.

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19 LAWRENCE K. KARLTON  
20 SENIOR JUDGE  
21 UNITED STATES DISTRICT COURT  
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